

1                   IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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4       SECURITYPOINT HOLDINGS, INC.,                   )  
5                               Plaintiff,                   ) Case No.  
6                               vs.                         ) 11-268C  
7       THE UNITED STATES OF AMERICA,                 )  
8                               Defendant.                 )

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10  
11  
12                               Courtroom 9  
13               Howard T. Markey National Courts Building  
14                               717 Madison Place  
15                               Washington, D.C.  
16                               Wednesday, November 1, 2017  
17                               10:30 a.m.  
18                               Defendant's Motion to Compel

19  
20  
21                               BEFORE:   THE HONORABLE ERIC G. BRUGGINK  
22  
23  
24

25       Susanne Bergling, RMR-CRR-CLR, Digital Transcriber

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1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFF:

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10 ON BEHALF OF THE DEFENDANT:

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12 ALICE S. JOU, ESQ.

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20 ALSO PRESENT:

21 Joel Lofgren, Esq., Department of Homeland Security

22 Mary Liddy, Esq., TSA

23 Marc Pilcher, Esq., TSA

24 Antonio DiNuzo, Sheppard Mullin

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1 P R O C E E D I N G S

2 - - - - -

3 (Proceedings called to order, 10:30 a.m.)

4 THE COURT: Okay, we're back. You want to  
5 make your appearances? For Plaintiff?

6 MR. GRAVELINE: Good morning, Your Honor, Brad  
7 Graveline for Plaintiff, SecurityPoint. With me is  
8 April Weisbruch and Antonio DiNuzo (phonetic), who is  
9 one of our law clerks.

10 THE COURT: All right, thank you.

11 For the Government?

12 MR. HAUSKEN: Good morning, Your Honor. Gary  
13 Hausken for the United States. With me are Alice Jou  
14 and Lee Perla for the Department of Justice. I also  
15 have Mary Liddy at table -- counsel table with us with  
16 the Department of -- the Transportation Security  
17 Administration. And in the two seats in the back are  
18 Marc Pilcher of the TSA and Joel Lofgren of the  
19 Department of Homeland Security.

20 THE COURT: Okay, thank you.

21 Okay. Mr. Hausken, they're both your motions,  
22 to enlarge the period of discovery and then for a  
23 protective order, I guess. There's so many moving parts  
24 to both motions that I'm wondering if it would be better  
25 for you all to keep your seats and we just take things

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1 issue by issue on both --

2 MR. HAUSKEN: Your Honor, we do have a  
3 presentation for the motion to compel, where we have  
4 laid out some of the --

5 THE COURT: Aah.

6 MR. HAUSKEN: -- things that we have a  
7 PowerPoint that goes with that, if you care to see that.

8 THE COURT: Well, I certainly wouldn't want to  
9 get in the way of that. All right, let's go ahead.

10 MR. HAUSKEN: So Ms. Jou will handle that for  
11 us.

12 THE COURT: All right.

13 MS. JOU: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MS. JOU: I've got some slides today. I'll  
16 share that with counsel.

17 MR. GRAVELINE: Thank you.

18 MS. JOU: May it please the Court.

19 THE COURT: Yes, ma'am. Go ahead.

20 MS. JOU: The Government is here today because  
21 SecurityPoint has not produced documents in more than  
22 seven months of discovery. And that matters for three  
23 reasons. First, SecurityPoint has provided a very  
24 distorted image of its finances and its assets. It has  
25 redacted hundreds of documents, its financial documents.

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1 These redactions cover millions of dollars in assets.  
2 It has refused to produce any valuations that its  
3 investors have provided to its litigation funders or to  
4 its CEO. It's delayed production of its revenue-sharing  
5 agreements relating to the '460 patent.

6 The second reason is that SecurityPoint has  
7 provided insufficient information to establish its  
8 standing -- its standing to enforce the '460 patent.

9 And the third reason is -- relates to our  
10 motion for a protective order. We're seeking some  
11 encouragement from the Court to -- for the parties to  
12 cooperate. Some of the discovery that SecurityPoint was  
13 seeking relates to attorneys' fees. SecurityPoint does  
14 -- admittedly seeking attorneys' fees, while refusing to  
15 unredact the amounts of its attorneys' fees. In some of  
16 -- there are some other examples that we'd like to get  
17 into today.

18 THE COURT: Hmm.

19 Okay, well, can I swap with you? Do you have  
20 mine? Oh, it's a reply.

21 Well, you can assume I've read everything,  
22 both of you. And let's try to keep the adjectives down  
23 to a bare minimum, if we can. I just need the facts and  
24 the legal argument.

25 MS. JOU: Sure. I'd like to start, then, with

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1 the redacted financial documents, and that's at tab 1.

2 THE COURT: Mm-hmm.

3 MS. JOU: SecurityPoint has produced hundreds  
4 of redacted documents and now is claiming that it will  
5 produce some more information but only what it deems  
6 appropriate. And, so, we don't have any idea of what  
7 kind of information has been withheld in these redacted  
8 financial documents.

9 THE COURT: All right. So what do you  
10 understand Plaintiff's response on this issue to be?

11 MS. JOU: They haven't told us when they're  
12 going to produce --

13 THE COURT: Right.

14 MS. JOU: -- the unredacted documents.

15 THE COURT: Okay.

16 MS. JOU: They haven't told us why they  
17 redacted these documents. They haven't told us whether  
18 they have a privilege claim. And we'd also like these  
19 documents in native format. The last page on that  
20 section, there's a blue sheet entitled GA -- it's page  
21 number GA-103. It's after slide 12.

22 THE COURT: Mm-hmm.

23 MS. JOU: So there's a blue sheet in that  
24 section, GA-103. And it's the text in that section --  
25 that document is microscopic, so we need the native

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1 files.

2 THE COURT: Okay. Well, my shorthand read of  
3 what the Plaintiff is saying is in principle they don't  
4 disagree with this, we'll furnish this at some point  
5 unspecified.

6 MS. JOU: And in order for the Court to have  
7 any kind of fair trial on damages --

8 THE COURT: No, I agree. Stay there. Let's  
9 talk about this one. You can keep your seat.

10 MR. GRAVELINE: Okay. We will agree, Your  
11 Honor, to go back and unredact some of it. The portions  
12 that we're going to maintain our redactions over are  
13 simply amounts spent on legal fees and any documents  
14 that would reflect any legal advice about valuation.  
15 Other than that, we will unredact the documents. And we  
16 can do that promptly.

17 THE COURT: Okay. Define promptly.

18 MR. GRAVELINE: Two weeks.

19 THE COURT: Okay. Now, on the legal fees,  
20 that really anticipates a separate question, doesn't it?

21 MS. JOU: Yes.

22 THE COURT: All right, so, the Plaintiff is  
23 entitled under 1498 to -- I'm trying to recall exactly  
24 what the wording is, but it's entitled to recover its  
25 fees unless the Government's position was substantially

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1 justified, I believe, sort of borrowing EAJA. Which  
2 numbered item is legal fees in your presentation?

3 MS. JOU: It's tab 9 -- or tab 8.

4 THE COURT: Tab 8, all right.

5 MS. JOU: Slide 54.

6 THE COURT: Yeah, you characterize this as a  
7 protective order, but, in fact, you want to know what  
8 they've been spending on legal fees.

9 MS. JOU: Well, we don't know what they've  
10 redacted on their financial documents. Certainly many  
11 of the redactions come in the asset sections, covering  
12 its assets. And, so, we don't think there should be --  
13 we don't know why those assets have been redacted.

14 THE COURT: Well, we just heard one reason,  
15 legal fees, and that's what I want to explore.

16 I need the brief.

17 MS. JOU: And I'm not sure, Your Honor, that  
18 legal fees would fall under assets. There seem to be  
19 many more redactions than just legal fees.

20 THE COURT: Right. Well, you must be also  
21 looking for expenses as well. So -- on fees,  
22 presumably? Well, let's -- hang on a second. Let me  
23 find in your brief -- I thought there was an affirmative  
24 request for information regarding legal fees.

25 MS. JOU: No, the Government has not -- this



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1 is -- the redactions coming -- what SecurityPoint has  
2 claimed -- has produced for its damages case is its  
3 financial documents, and we're finding lots and lots of  
4 redactions.

5 THE COURT: No, I understand, but I thought  
6 there was a specific request by the Government for --

7 MS. JOU: No.

8 THE COURT: -- information that was withheld  
9 on the grounds that it related to legal fees.

10 MS. JOU: We did seek some information  
11 regarding litigation funding, that it received from  
12 third parties and its investors.

13 THE COURT: Right, okay. Well, all right,  
14 let's talk about fees, then, as a separate item.

15 Mr. Graveline, why would that -- I mean,  
16 you're -- you can keep your seat. That would probably  
17 simplify life.

18 Why would the amount Plaintiffs spend on legal  
19 fees not at some point anyway be relevant?

20 MR. GRAVELINE: Your Honor, it would be  
21 relevant at some point, and as you note, and we are  
22 entitled to legal fees under the statute, and when we  
23 are proving up our legal fees, we certainly will provide  
24 invoices that show the amount of the fees. The amounts  
25 on the spreadsheet are different from invoices and would

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1 show things like, you know, legal fees to date or  
2 something like that.

3 THE COURT: But what -- why bother to protect  
4 them in the interim? What's the reason for it?

5 MR. GRAVELINE: You know, I think things that  
6 just reflect a number would be one thing, so the number  
7 spent on legal fees. I think we would be concerned  
8 about producing things that would show a litigation  
9 budget, which I think would be privileged.

10 THE COURT: Mm-hmm.

11 MR. GRAVELINE: Or any valuation that was  
12 based on a lawyer's assessment.

13 THE COURT: Fair enough. So numbers are going  
14 to be produced, then. And, so, assuming things get  
15 unredacted within two weeks, what is the second area?

16 MS. JOU: Relating to the Government's -- to  
17 SecurityPoint's litigation funding. That would be at  
18 tab 2.

19 THE COURT: Litigation funding. Well, tell me  
20 -- I mean, in principle, why would how somebody pays for  
21 litigation matter unless it involves a transfer of  
22 ownership?

23 MS. JOU: Why would it matter unless it  
24 involved a transfer?

25 THE COURT: Mm-hmm.

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1 MS. JOU: We -- well, the Federal Circuit has  
2 looked at litigation funding agreements to determine  
3 standing. It has affirmed the District Court's  
4 dismissal of a patent plaintiff that had legal title  
5 because of its provisions and its agreements with a  
6 third-party litigation funder. That is because --

7 THE COURT: Right, and if that's the one that  
8 I recall, I'm trying to remember who the Plaintiff was.  
9 Was the Plaintiff the one that was trying to horn into  
10 the litigation? I think it was. What was the name of  
11 that case?

12 MS. JOU: Enhanced Security Research, LLC, was  
13 the District of Delaware.

14 THE COURT: No.

15 MS. JOU: It was in our reply brief.

16 THE COURT: Hmm.

17 MS. JOU: Because the Federal Circuit requires  
18 -- in assessing standing, you're required to review the  
19 actual provisions and the substance of what was  
20 transferred. And a very critical right in assessing  
21 standing is the right to enforce the patent, the right  
22 to make litigation decisions freely, to make settlement  
23 decisions freely. Some of the materials we've cited  
24 indicates that there was a third party investing  
25 millions of dollars, and those investments come at key

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1 points in this litigation. And whether that means they  
2 have some influence over this litigation and the  
3 decision to settle will affect its standing.

4 THE COURT: The decision to settle?

5 MS. JOU: Or the right to enforce the patent,  
6 so --

7 THE COURT: Right.

8 MS. JOU: -- the decision to -- how it  
9 litigate this case, how SecurityPoint will litigate this  
10 case, how SecurityPoint --

11 THE COURT: Well, what business is it of -- no  
12 offense -- of the Government's how the Plaintiff decides  
13 to litigate its case?

14 MS. JOU: It's relevant to whether the  
15 Plaintiffs have standing to enforce the patent.

16 THE COURT: Right, but let's talk about what  
17 that means. Doesn't that devolve down to who owns the  
18 patent and when did they own a right in it?

19 MS. JOU: And that's what we need these  
20 litigation funding agreements to see what rights were  
21 transferred --

22 THE COURT: Okay.

23 MS. JOU: -- in relation to these millions of  
24 dollars of investments that it received.

25 THE COURT: So narrow down to were there any

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1     agreements, but what -- it wouldn't be limited, would  
2     it, to litigation funding? I mean, the Plaintiff could  
3     simply have sold rights in the patent.

4             MS. JOU: And we'd like to know about that as  
5     well.

6             THE COURT: Right.

7             MS. JOU: And we haven't got that.

8             THE COURT: Was that a different bullet?

9             MS. JOU: Well, I'll just show you the  
10    response that we've received from SecurityPoint. It's  
11    on slide 15. SecurityPoint stated that it was not aware  
12    of any relevant nonprivileged documents. It made no  
13    relevance objection. We did not know that these  
14    documents existed. We had to do our independent  
15    investigation to prove that -- this statement.

16            THE COURT: All right. Why would it not be  
17    relevant on standing, which theoretically is  
18    jurisdictional, to know whether or not the Plaintiff --  
19    all right, I may be "mooshing" a couple of issues  
20    together, but whether the Plaintiff owned at the time of  
21    filing all rights to the patent.

22            MR. GRAVELINE: Yeah, and the answer to that  
23    is yes, and I believe we have produced all relevant  
24    assignment documents, and there has been no transfer of  
25    ownership. So there's no document -- the document that

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1 counsel seems to be looking for just doesn't exist, so  
2 our answer to the request was accurate.

3 THE COURT: All right. So if there is  
4 litigation funding by some third party, you're telling  
5 me that that did not involve any transfer of ownership.

6 MR. GRAVELINE: Correct.

7 THE COURT: If that's accurate, why would  
8 anything beyond that be relevant?

9 MS. JOU: Your Honor, first of all, I think  
10 it's not -- it's Plaintiff's burden to establish its  
11 jurisdiction here -- this Court's jurisdiction. They  
12 can't just make these bare statements saying that  
13 they've never assigned the patent. And the Federal  
14 Circuit doesn't look at documents titled assignments.  
15 They look at provisions of agreements that transferred  
16 rights, and that could include litigation funding  
17 agreements.

18 But also, secondly, the amount of this money  
19 that they've received is also relevant to damages. It's  
20 relevant to SecurityPoint's profit and loss  
21 determinations that we still don't have. I mean, how --  
22 what it counts as an asset, what it counts as profit  
23 from its business. SecurityPoint --

24 THE COURT: What's the -- well, let's talk  
25 about that one first. Profit and loss down the road

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1 from selling its intellectual profit, yeah, sure, that  
2 would be relevant, but if it borrows money or -- well,  
3 borrowing, that wouldn't affect the profit or loss on  
4 the -- to litigate, would not affect the Georgia-Pacific  
5 factors.

6 MS. JOU: Borrowing, we would still need to  
7 see the terms of the provision to see what rights were  
8 transferred at --

9 THE COURT: Well, tell me what kind of right  
10 would be transferred that would be relevant here to  
11 standing.

12 MS. JOU: It would be the right to freely  
13 enforce the patent, to make litigation decisions, to  
14 make settlement decisions, also the right if -- if this  
15 -- the right to assign SecurityPoint, if SecurityPoint  
16 has a right to the '460 patent. Sometimes in these  
17 litigation funding agreements, SecurityPoint is not  
18 allowed to, for example, assign the patent to a third  
19 party during the course of the litigation. All of these  
20 things matter to who has standing to enforce the patent.

21 And an analogy I can give you is if the bank  
22 gives you a loan for your house, you own the house and  
23 you have the deed, because all the bank is doing is  
24 giving you money. But once the bank starts telling you  
25 who can live in your house, who you're allowed to rent

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1 it to, and once the bank says it wants a percentage of  
2 your rental income, then it starts blurring the lines  
3 into what -- who actually owns the house at that point.

4 THE COURT: Well, all right. Let's assume  
5 that those kinds of rights would be relevant here. What  
6 assurance does the Government have that they don't  
7 exist?

8 MR. GRAVELINE: There just is no such document  
9 that transfers any of those rights, the rights to settle  
10 the case. The rights to the patent simply just had not  
11 been assigned. It's different from the case that Ms.  
12 Jou relies upon.

13 THE COURT: In what way?

14 MR. GRAVELINE: We don't have an assignment  
15 here.

16 THE COURT: Well, all right, so what is  
17 somebody getting in exchange for investing in the  
18 litigation?

19 MR. GRAVELINE: I think, Your Honor, we don't  
20 have a litigation funding agreement. I can represent  
21 that. We have investors who have invested in the  
22 company, but there's not sort of a classic litigation  
23 funding agreement as counsel seems to think there is.

24 THE COURT: Okay.

25 MS. JOU: And, Your Honor, I can respond to



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1     that that Enhanced Security Research from the District  
2     of Delaware was a company created by the inventor. The  
3     inventor transferred his rights to the company, and then  
4     a litigation funding firm created a separate shell  
5     company and the agreements were between the shell  
6     company and the Plaintiff.

7             And it was the -- and it wasn't -- it wasn't a  
8     classic litigation funding agreement. It was just an  
9     agreement between two -- it was called a purchase  
10    agreement between two companies. It seems -- it was the  
11    purchase agreement, and I'm not sure what kind of  
12    purchase agreement it was, but, you know, the Federal --  
13    the District Court there actually examined the specific  
14    provisions of that agreement to see what actually was  
15    transferred.

16            And that's what the Federal Circuit is  
17    requiring in last year's Diamond Coating Technologies.  
18    This is a Federal Circuit case from 2016. They  
19    explicitly said you're not -- you can't just look at  
20    bare title -- bare formalities. You can't look at a  
21    document just that's called an assignment. You need to  
22    look at the provisions, what rights were transferred,  
23    and a critical right is the right --

24            THE COURT: Tell me what question you asked  
25    that you think you're not getting an answer to.

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1 MS. JOU: It's on slide 14. It's RFP Number  
2 41. And it's -- the request is all documents,  
3 communications, and things, including but not limited to  
4 the valuation document, relating to the Plaintiff's --  
5 documentation relating to the Plaintiff, the patent in  
6 suit, which were prepared or provided to obtain  
7 litigation funding, including but not limited to Raptor.  
8 And SecurityPoint's response was it was not aware of any  
9 relevant nonprivileged documents that are responsive to  
10 this request.

11 THE COURT: Okay.

12 MS. JOU: And we didn't -- we didn't have --  
13 we didn't know that they were going to withhold any  
14 information based on this response.

15 THE COURT: There's no relevance objection  
16 here?

17 MR. GRAVELINE: There is a relevance  
18 objection, yes.

19 THE COURT: Oh.

20 MR. GRAVELINE: Any litigation funding  
21 agreement was not relevant to any issue in the case, and  
22 I think it's well established that those sorts of  
23 documents are covered by the attorney/client privilege  
24 and the work product doctrine.

25 THE COURT: Wouldn't that depend on whether or

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1 not there's any assignment of rights?

2 MR. GRAVELINE: And there has not been an  
3 assignment of rights.

4 THE COURT: Now, the request was for venture  
5 capital. Why would investments in Plaintiff not be  
6 relevant?

7 MR. GRAVELINE: We can produce documents that  
8 relate to investments, and I believe we have produced  
9 the majority of those documents.

10 THE COURT: Hmm. Raptor Accelerator?  
11 What's -- it is -- what is its role?

12 MR. GRAVELINE: They're an investor, Your  
13 Honor.

14 THE COURT: Does the Government have those  
15 documents?

16 MR. GRAVELINE: I believe so, and we can  
17 certainly check. And if there's any more, we can  
18 produce them.

19 MS. JOU: Your Honor, we have not received  
20 those documents. We've separately subpoenaed Raptor,  
21 and they've hired Mr. Graveline's firm to represent them  
22 in the subpoena. So we're not getting documents. We  
23 haven't gotten documents in the last seven months, Your  
24 Honor.

25 Then their response is that there were no

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1 relevant documents. We had to go looking at public  
2 sources. We looked up SEC filings to establish there  
3 was about \$8 million in investments that we weren't told  
4 about. It seems significant, and it seems there would  
5 be some rights exchanged, or there could be that need to  
6 be examined for what rights they received.

7 And in addition, we're also looking for  
8 valuation documentation, and that's not covered by -- at  
9 least they haven't raised any privilege claim about this  
10 valuation. Certainly when investors invest in your  
11 company, they discuss what that valuation -- what that  
12 investment is worth and how -- how they're going to  
13 value that. The case -- the Government has cited two  
14 cases in patent -- in patent.

15 THE COURT: Valuation documents?

16 MR. GRAVELINE: We can produce all ownership  
17 and valuation documents. We're not objecting to that.

18 THE COURT: Well --

19 MR. GRAVELINE: What we are objecting to would  
20 be privileged communications where there was any sort of  
21 an assessment of value by a lawyer.

22 MS. JOU: And --

23 THE COURT: Well, that's -- it doesn't sound  
24 like that's the basis for the prior nonproduction. All  
25 right. For the time being, I'm going to assume that the

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1 Government is going to get anything remaining on Request  
2 41 related to valuation.

3 MS. JOU: Your Honor, can I just clarify? Is  
4 that -- will that -- is there going to be privileged  
5 information? What is SecurityPoint claiming as its  
6 privilege? What will SecurityPoint be withholding?

7 THE COURT: Oh, I don't know.

8 MS. JOU: It sounds -- I mean, litigation  
9 funding documents, even in the cases that SecurityPoint  
10 cited, even if they reflect an attorney's opinions, are  
11 not privileged.

12 THE COURT: As I was saying, I'm going to  
13 assume that Plaintiff is going to respond to everything  
14 on this list. With respect to litigation funding, I'm  
15 taking Mr. Graveline's representations at face value  
16 that none of the litigation funding carries with it any  
17 transfer of rights or interest in enforcement of the  
18 patent or management of the litigation.

19 MR. GRAVELINE: That's correct, Your Honor.

20 THE COURT: And then the rest of it I assume  
21 the Government will be getting to the extent that it's  
22 not privileged. Now, would that come with a privileged  
23 log?

24 MR. GRAVELINE: We would be happy to produce a  
25 privilege log as well.

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1 THE COURT: All right.

2 MR. HAUSKEN: Your Honor, in that respect, if  
3 I may, it has been the practice of both parties not to  
4 create huge, burdensome privilege logs. And, so, if  
5 they want to do it just for that issue, that would be  
6 acceptable to the Government. I don't think it's  
7 helpful to either party to ask for broad privilege logs  
8 at this point in time after the length of time of this  
9 litigation.

10 THE COURT: Okay. Thank you.

11 Item 3.

12 MS. JOU: This is --

13 THE COURT: Well, we're still on 41. We've  
14 talked about that.

15 MS. JOU: This is at tab 3. This is also in  
16 addition to Raptor. It's the other investors, and I  
17 think we've covered this --

18 THE COURT: Right.

19 MS. JOU: -- that SecurityPoint will produce  
20 relating to its other investors. There's -- a separate  
21 and related issue is SecurityPoint Media, LLC. That's a  
22 subsidiary, or at least SecurityPoint said in trial that  
23 it's a subsidiary of the Plaintiff. There appears to --  
24 we also want the operating agreements related to  
25 SecurityPoint Media, LLC.

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1 THE COURT: All right. Now, is this in  
2 connection with who the real party in interest is?

3 MS. JOU: No. It's in connection with who --  
4 which party owns the patent. There are two different  
5 parties named SecurityPoint Media, LLC. One of these is  
6 a success -- a predecessor in interest to the current  
7 plaintiff. Another -- another company named  
8 SecurityPoint Media, LLC was asserting the '460 patent  
9 in litigation in the Middle District of Florida in 2007.  
10 And, so --

11 THE COURT: Okay.  
12 How about clearing up that issue.

13 MR. GRAVELINE: I believe that is clear, but  
14 if there's anything else, we're happy to produce it.

15 THE COURT: Well, all right, the litigation  
16 was brought initially by whom?

17 MS. JOU: SecurityPoint Media, LLC. That's  
18 slide 27 is a --

19 THE COURT: All right, now, what's the  
20 connection between Security -- well, let me ask  
21 Plaintiff -- SecurityPoint Holdings, Inc. And whoever  
22 was named originally? Didn't we substitute somebody in  
23 a long time ago?

24 MR. GRAVELINE: I believe we did, Your Honor.  
25 And, again, I don't have all the details about this

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1 right at hand, but we can make sure that any assignment  
2 documents are produced. And I believe they have been.

3 MS. JOU: And let me -- I can just clarify  
4 that. The -- your initial Plaintiff in this case was  
5 SecurityPoint Holdings, LLC, and it's now been  
6 substituted with SecurityPoint Holdings, Inc.

7 THE COURT: Hmm.

8 MS. JOU: Before SecurityPoint Holdings, LLC,  
9 it was an entity called SecurityPoint Media, LLC. The  
10 date that it changed its name from SecurityPoint Media,  
11 LLC to SecurityPoint Holdings, LLC, was January 15th,  
12 2007. A separate entity, which is not the predecessor  
13 in interest, was created on January -- two days -- so  
14 this is slide 25. From the predecessor in interest to  
15 this Plaintiff currently is -- was operating under the  
16 name Security -- SecurityPoint Media, LLC from 2006  
17 through January 15th, 2007. It changed its name to  
18 SecurityPoint Holdings January 15th, 2007.

19 Two days later, and that's the next slide, on  
20 slide 26, a new entity was created effective January  
21 17th, 2007. That entity was also named SecurityPoint  
22 Media, LLC. And then two months later, on the next  
23 slide, slide 27, an entity called SecurityPoint Media,  
24 LLC asserted the '460 patent. Now that entity, the  
25 second SecurityPoint Media, is not a predecessor in



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1 interest to the current Plaintiff in this case.

2 And, so, if SecurityPoint has -- we have not  
3 seen any assignment done.

4 THE COURT: Hang on.

5 MR. GRAVELINE: We will produce anything we  
6 have on that and clear this up. Again, I don't have the  
7 facts at hand. You know, this all sounds very  
8 nefarious, but there -- it's not. We will produce any  
9 assignment documents that have not yet been produced.

10 THE COURT: Well, all right. I'm surprised at  
11 the iterations of the Plaintiff aren't well known.

12 MR. GRAVELINE: I believe they are, Your  
13 Honor. I believe this was known many, many years ago by  
14 counsel, so...

15 MS. JOU: And one more issue, and this is  
16 slide 30, that the Patent Office -- or slide 29, that  
17 the Patent Office records for assignment of the patent  
18 show that the patent was assigned to an entity called  
19 SecurityPoint Media, Inc.

20 THE COURT: Mm-hmm.

21 MS. JOU: And that's not SecurityPoint Media,  
22 LLC that asserted the patent. And it doesn't seem to be  
23 a predecessor in interest to this Plaintiff. And that  
24 assignment agreement, there's an excerpt of that in  
25 slide 30. That was -- that assignment was executed in

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1 July 2003.

2 THE COURT: Mm-hmm.

3 MS. JOU: The next slide, slide 31, is a  
4 corrected worldwide assignment that was executed after  
5 this litigation was commenced. And that purports to  
6 correct the assignment that was previously made to  
7 SecurityPoint Media, Inc.

8 THE COURT: Mm-hmm.

9 MS. JOU: And that's relevant because the  
10 Federal Circuit has held that the Plaintiff, on the day  
11 that it filed suit, must have standing to assert the  
12 patent. And if there's a mistake, a retroactive  
13 assignment doesn't fix that for standing purposes.

14 THE COURT: Retroactive assignment?

15 MS. JOU: And, so, this is -- slide 31 is an  
16 example --

17 THE COURT: No, but it -- well, all right. I  
18 agree it appears scrambled and it has to be cleared up,  
19 but at the end of the day, as long -- if the pea under  
20 the pod is only a single patent and that's the one at  
21 issue here, isn't the solution potentially to substitute  
22 a different party with an amendment back under Rule 15?

23 MS. JOU: Well, so, they've cited the case  
24 called Abraxis out of the Federal Circuit in 2010, and  
25 these were mistakes made -- the patent owners were

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1 subsidiaries of a pharmaceutical company, AstraZeneca,  
2 and they had transferred the patents between each other  
3 and by mistake also sold off patents before they had  
4 been properly assigned. And even in that case there was  
5 no nefarious -- there was no intent -- there was no  
6 finding that this was done for a bad purpose. It was  
7 just a mistake.

8 THE COURT: Um-hum.

9 MS. JOU: But even in that case the Federal  
10 Circuit held that you can't go back and fix the mistake.  
11 You can't fix it. You have -- you have to dismiss it.  
12 These --

13 THE COURT: I'd be surprised. It seems to me  
14 we're not talking about fixing something with the Patent  
15 Office. We're talking about fixing something in this  
16 litigation.

17 MS. JOU: It's fixing --

18 THE COURT: Well, whatever -- I need to know the  
19 facts. So I will task the Plaintiff with creating  
20 whatever historical record we need to have to make sure  
21 that the right entity is in front of me.

22 MR. GRAVELINE: We will do that, Your Honor.

23 THE COURT: Okay. Now, is that the Clear Channel  
24 issue?

25 MS. JOU: That's tab 4. Clear Channel is a

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1 separate request for production. It's number 47.  
2 SecurityPoint hasn't disputed the relevance of its  
3 litigation with Clear Channel. And just to give you  
4 some background on what Clear Channel is, SecurityPoint  
5 operates in airports, and in some of these airports they  
6 have an exclusive advertising broker. And so in order  
7 for SecurityPoint to enter into these airports, they  
8 have to sign a revenue-sharing agreement with the  
9 exclusive ad broker.

10 Clear Channel is one of those, and Clear  
11 Channel's response -- we requested documents from their  
12 litigation with Clear Channel. SecurityPoint's response  
13 was that it was not presently aware of any relevant,  
14 nonprivileged documents that are responsive to this  
15 request. That's slides 33 and 34.

16 But that doesn't seem to be true in that in slide  
17 35, the Clear Channel litigation settled in January  
18 2017. It's been more than ten months, and we still  
19 haven't gotten any Clear Channel litigation documents.  
20 And in that Clear Channel litigation, Clear Channel --  
21 it settled shortly after Clear Channel moved to amend  
22 its complaint, and it accused SecurityPoint of scheming  
23 to inflate operational expenses and conceal contracts,  
24 and it accused SecurityPoint of failing to properly  
25 account for all revenues, fees, and costs in accordance

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1 with the agreement.

2 And so we would like information from this Clear  
3 Channel litigation. Much of the -- much of the filings  
4 are under seal --

5 THE COURT: Oh. And so is there a reported  
6 opinion in this case?

7 MS. JOU: No. The case settled after Clear  
8 Channel moved to amend its complaint with these  
9 additional allegations about SecurityPoint's record  
10 keeping practices.

11 THE COURT: What precisely are you saying you're  
12 entitled to that would be relevant from the Plaintiff's  
13 litigation files?

14 MS. JOU: Well, certainly the settlement  
15 agreement, because SecurityPoint and Clear Channel have  
16 a revenue-sharing agreement that relates to the '460  
17 patent, so how much -- the settlement agreement relates  
18 to what SecurityPoint has received in this agreement  
19 relating to the '460 patent, but we're also --

20 THE COURT: Well, where did you get the  
21 complaint?

22 MS. JOU: We haven't gotten the full complaint.  
23 I think public portions of it were available on the  
24 docket, and so we've downloaded those, but beyond that,  
25 there are many -- many of the filings are sealed, and

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1     certainly the settlement agreement is something we would  
2     like to see, and it's relevant to damages.

3             THE COURT:   What is the connection between Clear  
4     Channel and the Plaintiff?

5             MR. GRAVELINE:   There is no connection, Your  
6     Honor.   They were just involved in litigation against  
7     each other.

8             THE COURT:   I mean --

9             MR. GRAVELINE:   They had agreements to operate in  
10    airports, and we're not objecting to producing those.  
11    We are objecting to producing things like the settlement  
12    agreement, which I don't think settlement of litigation  
13    is relevant to any damages issues in the case.   The only  
14    concern is, because as counsel noted, a lot of these  
15    documents were filed under seal, and since we have  
16    confidentiality obligations, we have to coordinate this  
17    with Clear Channel.

18            THE COURT:   Well, when I asked what the  
19    connection was, I mean, is it -- is Clear Channel a  
20    licensee under the Plaintiff's patent?

21            MR. GRAVELINE:   I don't believe so, Your Honor.  
22    I do think there were some licensing terms, but it's a  
23    different sort of license.   Clear Channel doesn't --  
24    unlike TSA -- have the right to operate the checkpoints.  
25    So Clear Channel wouldn't have the right to directly

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1 practice the method claims in the patent.

2 MS. JOU: And, Your Honor --

3 THE COURT: The settlement agreement, does that  
4 assume an ongoing relationship between the Plaintiff and  
5 Clear Channel?

6 MR. GRAVELINE: I don't know, but I don't believe  
7 so.

8 THE COURT: Why would the settlement agreement be  
9 available to third parties?

10 MS. JOU: Well, we separately subpoenaed Clear  
11 Channel, and they've -- you know, they've referred all  
12 of this back to SecurityPoint, but SecurityPoint --  
13 since SecurityPoint is the party in this litigation, we  
14 should get all these documents from SecurityPoint, but  
15 it matters to the Government because Clear Channel and  
16 SecurityPoint split revenues related to the advertising  
17 on the bins at the checkpoints and related to the '460  
18 patent.

19 If we don't have a -- we don't have a clear  
20 picture of what SecurityPoint's revenues are, what  
21 portion of it came from Clear Channel, what portion of  
22 it came from other airports, we need -- we need to have  
23 this documentation to --

24 THE COURT: Well, let's assume there wasn't any  
25 litigation.

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1 MS. JOU: There wasn't -- okay.

2 THE COURT: Let's assume there wasn't --

3 MS. JOU: All right.

4 THE COURT: -- between Clear Channel and  
5 Plaintiff. Would you still be asking for any operating  
6 agreements between the two?

7 MS. JOU: Yes, and that's the subject of the next  
8 tab, tab 5, which --

9 THE COURT: Hang on.

10 MR. GRAVELINE: We will produce those documents  
11 if they haven't produced.

12 THE COURT: All right.

13 MS. JOU: And -- well, relating to --

14 THE COURT: But the settlement agreement -- hmm,  
15 I don't know. I'll tell you what, let's see what gets  
16 kicked out after you have this consultation with Clear  
17 Channel, although it sounds like they've punted to the  
18 Plaintiff. It sound as if the Plaintiff's dealings with  
19 Clear Channel would be relevant on the issue of damages,  
20 and so I think the Government is entitled to anything  
21 that's not privileged in that regard.

22 The settlement agreement, I'm not saying yea or  
23 nay, because I -- you know, I can imagine that there  
24 would be elements of the settlement agreement that would  
25 be confidential, but if it relates to -- if it has any



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1 backspin in terms of affecting how the revenues are  
2 split or -- you know, I think the Government's entitled  
3 to know how much money the Plaintiff is making off of  
4 its patent, and if the settlement affects how that was  
5 calculated in this case, then I think it's probably  
6 discoverable.

7 In any event, whatever the ongoing relationships  
8 are between the parties, it sounds as if it would be  
9 discoverable unless it's otherwise privileged.

10 MS. JOU: The next tab is related to this.  
11 It's -- in addition to Clear Channel -- this is slides  
12 37 and 38. In addition to Clear Channel, there are  
13 other advertising brokers that have agreements with  
14 SecurityPoint related to the '460 patent. When we asked  
15 for these agreements, SecurityPoint responded it was not  
16 aware of any relevant responsive and nonprivileged  
17 documents.

18 Again, the next page, on slide 39, SecurityPoint  
19 cited these agreements with Clear Channel and with  
20 JCDecaux more than four years ago.

21 THE COURT: Why would -- why would whatever  
22 revenue the Plaintiff generates from the patent from  
23 others besides Clear Channel not be relevant?

24 MR. GRAVELINE: And we have agreed to produce  
25 those documents as well, Your Honor. I don't think

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1       there's an issue there.

2               MS. JOU:   Okay, just --

3               THE COURT:   And when are we talking about?   How  
4       soon?

5               MR. GRAVELINE:   Three weeks?

6               MS. JOU:   Okay.

7               THE COURT:   Okay.

8               MS. JOU:   And in SecurityPoint's opposition, they  
9       also said they would produce them if appropriate, and  
10      we're concerned about that appropriateness objection.

11              THE COURT:   Well, I think I've made it clear.

12              MS. JOU:   Okay.

13              THE COURT:   They are discoverable unless they are  
14      privileged, and --

15              MS. JOU:   Thank you.

16              THE COURT:   -- they will be identified if they  
17      are privileged.   I would expedite things by going ahead  
18      and doing a privilege log, but I'm not going to require  
19      it.

20              Now, divorce proceedings.

21              MS. JOU:   That's slide 41.   The Government has  
22      narrowly limited this request to the valuations of the  
23      patent and of SecurityPoint and of its assets from the  
24      divorce proceedings.   We're not asking for anything else  
25      but the valuations.

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1 THE COURT: Um-hum.

2 MS. JOU: And that's relevant because this -- the  
3 patent was acquired during this marriage. The ownership  
4 in SecurityPoint was also acquired during this marriage.  
5 Those are probably the two most significant assets, and  
6 under Florida law, they are going to be equitably  
7 distributed. So we -- we --

8 THE COURT: If they were valued by the Plaintiff,  
9 why wouldn't that be relevant?

10 MR. GRAVELINE: I think any valuation that was  
11 done during a divorce proceeding would be totally  
12 different from a valuation in this case. A family court  
13 judge is not going to apply the Georgia-Pacific factors  
14 to figure out what a reasonable royalty would be. So  
15 what counsel is looking for is basically like the future  
16 value. You know, they're trying to get at, you know,  
17 what the patent might be worth in the future, after  
18 litigation occurs, and things like that.

19 THE COURT: The Plaintiff presumably took a  
20 position in the divorce proceedings about what these  
21 patent rights were worth.

22 MR. GRAVELINE: You know, I'm not sure, Your  
23 Honor, and it was Mr. Ambrefe. The patent is owned by  
24 SecurityPoint.

25 THE COURT: Yeah, right. I'm sorry, right.

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1 MR. GRAVELINE: Yeah.

2 THE COURT: Hmm. So it would be him valuing his  
3 stock ownership in the Plaintiff?

4 MR. GRAVELINE: I believe that's what counsel's  
5 looking for, yeah.

6 THE COURT: And how many other assets does the  
7 Plaintiff have besides the patent?

8 MR. GRAVELINE: I mean, his home and, you know,  
9 investments, things of that nature.

10 THE COURT: The Plaintiff corporation?

11 MR. GRAVELINE: No, Mr. Ambrefe, which is what  
12 counsel is looking for in the divorce proceedings.

13 THE COURT: No, I understand, but, I mean, if  
14 he's valuing the stock in SecurityPoint, what is he  
15 valuing other than the patent?

16 MR. GRAVELINE: I think it would be difficult to  
17 value at that point in time certainly for the purposes  
18 of a divorce proceeding, where you're not talking about  
19 what patent damages might be down the road. The issue  
20 before the Court currently is what the royalty should be  
21 based on the Georgia-Pacific factors, not what the value  
22 of an asset was either before or very early in  
23 litigation.

24 THE COURT: I don't agree. I think -- I mean, it  
25 may be very, very remote, but I think the Government's

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1 entitled to argue from it. So go ahead and produce  
2 that.

3 MR. GRAVELINE: Limited to just valuation of the  
4 patent or stock in the company, correct?

5 THE COURT: Or stock in the company, right.

6 MS. JOU: The next tab is tab 7, and it's RFP  
7 Number 100 to 112. These are at slides 47 and 48. This  
8 relates to TSA's use -- SecurityPoint's use of TSA's  
9 logos and seals.

10 THE COURT: Um-hum.

11 MS. JOU: And SecurityPoint here makes a  
12 relevance objection that's much different from its prior  
13 relevance objections. They -- at slide 50, the  
14 Government pointed out SecurityPoint does not dispute  
15 that it uses TSA's logos, and at slide 50, we give an  
16 example of TSA's use of -- identifies TSA as a partner.

17 THE COURT: Um-hum.

18 MS. JOU: And also SecurityPoint did not dispute  
19 in its opposition that it has offered to license the  
20 '460 patent to TSA at no charge. This is relevant to  
21 the Georgia-Pacific factor of the commercial  
22 relationship between TSA and SecurityPoint. This is not  
23 a typical -- any hypothetical negotiation between the  
24 parties is not a typical competitor-to-competitor  
25 relationship, where SecurityPoint can claim a higher

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1 royalty rate if T -- if the Government were a typical  
2 competitor, but instead SecurityPoint has held TSA out  
3 as a partner. That's a different relationship, and that  
4 has a different value, and it affects the royalty rate  
5 that should be applied here.

6 THE COURT: "Copies of all documents that tend to  
7 relate to your use of the official" -- I wouldn't know  
8 how to begin answering that question. That tend to  
9 relate?

10 MS. JOU: And we have also served other requests  
11 related to their valuation of the use of this -- of the  
12 logo and --

13 THE COURT: Let's look at that one.

14 MS. JOU: That's not in my slides. It's -- it  
15 should be -- it's at GA-2 -- GA-195 in our appendix. I  
16 can pull it up if --

17 THE COURT: Let me see if that's one that I have.

18 MS. JOU: I can put that up on the screen as  
19 well.

20 THE COURT: I don't have it. Am I looking at --  
21 are you looking for a request for admission or an  
22 interrogatory?

23 MS. JOU: We have both. We have requests for  
24 production related to TSA's logos and as well as  
25 interrogatories related to the valuation -- how

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1 SecurityPoint valued the use of the logo.

2 THE COURT: All right. Well, we're looking for  
3 that interrogatory, then, okay.

4 MS. JOU: Yeah, that's --

5 THE COURT: Where is it?

6 MS. JOU: 191 is one example, GA-191.

7 THE COURT: Twenty-nine or 30?

8 MS. JOU: Both are -- they're similar, but 29  
9 starts with, "Please describe in detail the benefits,  
10 financial and otherwise, derived by you from your use of  
11 the official seal, main logo, and trademark of DHS TSA."

12 Then the next one, interrogatory number 30, is,  
13 "Please describe in detail the benefits, financial and  
14 otherwise, derived by you from referring to TSA as among  
15 your partners."

16 And we -- in our -- in our slides, we have  
17 identified slide 51 -- SecurityPoint makes  
18 presentations. They point out that they're willing to  
19 offer the patented system at no cost to TSA. They point  
20 out that -- this is at slide 51, so that's from GA-270,  
21 and this is a presentation that SecurityPoint has made.  
22 It -- the first --

23 THE COURT: I'm not sure -- what's the  
24 connection? They want the right to sell advertising, I  
25 assume?

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1 MS. JOU: And in the second bullet point there,  
2 SecurityPoint is talking about its relationship with TSA  
3 to other parties.

4 THE COURT: Right.

5 MS. JOU: So its connection to TSA has some value  
6 that affects --

7 THE COURT: Well, that's -- I'm -- I expect to  
8 see that argument, but what precisely is the question  
9 you're putting to -- let's go back to the interrogatory.

10 MS. JOU: The value of the use of TSA's --

11 THE COURT: Wait a minute. "...benefits,  
12 financial or otherwise, derived by you" -- well, before  
13 I start mouthing off on that, let me hear from the  
14 Plaintiff.

15 MR. GRAVELINE: I do not see the relevance to any  
16 of this, Your Honor, and I'm not sure how those  
17 interrogatories could possibly be answered. I feel  
18 fairly confident that there is no documents where  
19 anybody tried to assess the value of the use of any of  
20 these logos. So beyond that, I just -- I don't know the  
21 relevance or what they're looking for or even how we  
22 would go about answering this interrogatory.

23 THE COURT: Well, I'm not going to agree that  
24 it's irrelevant. It may or may not be relevant, but one  
25 of the Georgia-Pacific factors is the commercial



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1 relationship between the parties, and I would fully  
2 expect the Government to argue that Plaintiff is getting  
3 some benefit from it. But whether the Plaintiff has  
4 calculated that already, I'm not going to require the  
5 Plaintiff to calculate it.

6 So I'm going to assume that the answer to the  
7 interrogatory is we haven't done that calculation or  
8 there are no documents reflecting that. Is that  
9 accurate?

10 MR. GRAVELINE: I believe that is accurate, Your  
11 Honor.

12 THE COURT: And the document request is just too  
13 flabby, but if it amounts to the same thing -- namely,  
14 have you done any calculations -- then I'm going to  
15 assume the answer would be the same. But I'm not saying  
16 that the subject is irrelevant. If you want to fine  
17 tune some document or -- have you done depositions yet?

18 MS. JOU: No, Your Honor.

19 THE COURT: All right. I'm not saying it would  
20 be off limits in a deposition. Okay.

21 MS. JOU: And that's the last of our issues  
22 relating to the motion to compel, but we have some  
23 issues in the motion for protective order as well in tab  
24 8.

25 THE COURT: Right.

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1 MS. JOU: The first relates to discovery requests  
2 regarding attorneys' fees, and that's at slide 54.  
3 These discovery requests --

4 THE COURT: I'm not going to require you to  
5 answer those.

6 MS. JOU: Thank you.

7 THE COURT: RFP-3, 1, 4, and 5. The same on 6,  
8 7, and 8. Let's see, 11, 12, and 18. Okay.

9 MS. JOU: The next slide, slide 58, SecurityPoint  
10 has also sought discovery into opinions of counsel, and  
11 in their opposition brief, they didn't dispute that  
12 opinions of counsel in patent cases typically arise with  
13 respect to willful infringement, which is not an issue  
14 that comes up under --

15 THE COURT: Oh, right.

16 MS. JOU: -- Section 1498, but now in their  
17 opposition they're saying that this is relevant to  
18 attorneys' fees, and they claim that in a single  
19 footnote without any authority.

20 THE COURT: I'm not going to require that either.

21 MS. JOU: Thank you.

22 THE COURT: And I'm not going to require  
23 discovery about discovery. So to the extent that one of  
24 the 30(b)(6)s was somebody who can sort of unpack the  
25 discovery chain, I'm not going to require that.

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1 MS. JOU: Thank you.

2 MR. GRAVELINE: Your Honor, could I address that  
3 point just briefly?

4 THE COURT: Okay.

5 MR. GRAVELINE: We're not as much concerned about  
6 unpacking the discovery chain as we are about finding  
7 out if any documents exist and what was searched for. I  
8 think this really is a key issue. The Government has  
9 taken a position that it does not have records of when  
10 it used carts and trays at the checkpoints, and that's  
11 really what we're trying to get to, and to have  
12 witnesses --

13 THE COURT: And I will let you do it, but there  
14 will not be a separate 30(b)(6) witness for that sole  
15 purpose.

16 MR. GRAVELINE: Um-hum, okay.

17 THE COURT: You are welcome to pursue that  
18 through any witnesses who show up in response to other  
19 30(b)(6) requirements.

20 MR. GRAVELINE: Okay.

21 THE COURT: Yep.  
22 Anything else?

23 MS. JOU: And then our last is slide 62.  
24 SecurityPoint had a number of duplicative discovery  
25 requests that were often copied verbatim from its prior

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1 requests.

2 THE COURT: Um-hum.

3 MS. JOU: And we just think this is outside the  
4 bounds of Rule 26.

5 THE COURT: Well, if they're duplicative and  
6 you're satisfied you've answered them, tell them that.

7 MS. JOU: Okay.

8 THE COURT: But I gather what they have done is  
9 simply replicated their discovery requests for the first  
10 ten for everything else. If you've already answered it  
11 with respect to the first ten, you don't need to answer  
12 it again, but I don't know any other way that they would  
13 ask those same questions for the other airports, if I  
14 understand what's going on. But I'm not going to ask  
15 the Plaintiff to weed through that. If you think you've  
16 answered it, then say that.

17 MS. JOU: Okay.

18 THE COURT: All right.

19 Who's going to do the other --

20 MS. JOU: Thank you, Your Honor.

21 MR. HAUSKEN: Would you like me to come up to the  
22 podium or --

23 THE COURT: Sure, that's fine.

24 Okay, remind me where you are on your other  
25 motion for an extension of time.

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1 MR. HAUSKEN: I believe where we had left it is  
2 we were going to discuss it after the other motions,  
3 which you've just heard and have ruled on largely. So  
4 it's -- I guess it comes down to just what the Court's  
5 ruling will be. The problem that --

6 THE COURT: Did you all have any homework  
7 assignments since our last conversation?

8 MR. HAUSKEN: We have -- we have not, Your Honor.

9 THE COURT: Hmm, okay.

10 MR. HAUSKEN: And I think partly the -- Your  
11 Honor, I think that there is just a major rift between  
12 the parties as to how to handle this, and I think to  
13 some degree a large understanding perhaps as well. One  
14 of the problems is that -- so our -- we have asked  
15 obviously, as we have discussed before, for enlargement  
16 of time for discovery through I think it's April --

17 THE COURT: For all fact discovery?

18 MR. HAUSKEN: For fact discovery. Now, of that,  
19 if you look at the first paragraph of our motion, we  
20 actually anticipate that -- like, our answers to  
21 interrogatories and everything would be updated by  
22 mid -- I think it's the 19th of December, and then -- so  
23 we're anticipating that there would be some period of  
24 discovery after that to conduct -- you know,  
25 specifically so that both parties can conduct

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1 depositions and other forms of discovery.

2           We're -- we're not asking that this be the  
3 end-all of it. We understand from the Court's order  
4 that required us to essentially go first by trying to  
5 define the use of the invention at the airports, all 80  
6 airports, that there would have to be some, you know,  
7 testing of our numbers afterwards. And so to logically  
8 do that and -- you know, in a period of time that's  
9 doable, we -- you know, we're suggesting we would  
10 produce the -- the -- well, we have the draft proposal  
11 that we -- that we provided last -- at the last  
12 conference, which is the one that had the "For  
13 Discussion Purposes" on the top. That one -- you know,  
14 we would provide those answers, and then after that, the  
15 Plaintiffs would have an opportunity to test that.

16           THE COURT: Well, let's think about that. You  
17 saw what Mr. Graveline filed last night, I assume.

18           MR. HAUSKEN: No, I -- I have seen it. I,  
19 frankly, other than a cursory --

20           THE COURT: Well, I can tell you what it says in  
21 substance.

22           MR. HAUSKEN: -- overview, I --

23           THE COURT: In effect, allowing the Government to  
24 have this additional time to answer those  
25 interrogatories or requests for admission or whatever

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1     else is out there, in the face of the Government's  
2     general argument that we don't keep this information, is  
3     a -- kind of a fool's errand. In other words, we're  
4     wasting time.

5             So I understand that question, and it's a  
6     legitimate question, but my bigger concern, frankly, is  
7     how the Plaintiff will use whatever you give it by  
8     December 19th, and you've alluded to that by saying you  
9     anticipate some additional discovery.

10            MR. HAUSKEN: Um-hum.

11            THE COURT: If -- if the -- I'm not sure what  
12     the -- your answer is going to look like, obviously, but  
13     we haven't gained a whole lot if the Government's  
14     answers are not -- don't point the Plaintiff in the  
15     right direction in order to confirm your answers.

16            In other words, it would -- I assume even you  
17     would agree that you wouldn't expect the Plaintiff to  
18     simply take at face value that we didn't use your patent  
19     at these airports for this period of time.

20            MR. HAUSKEN: Oddly, yes, we would agree with  
21     that, although obviously just a minute ago Mr. Graveline  
22     suggested just the opposite with -- in terms of their  
23     license -- of their litigation support agreements, that  
24     we have to take it at face value what their answer is.

25            But, no, we understand that -- we are -- we are

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1 producing information for the purpose of allowing them  
2 then to have an idea of what the operation at each  
3 individual airport looks like, why we think that some of  
4 the -- a portion of the population that travels through  
5 that airport should be excluded from the use.

6 THE COURT: But the "why," that's the critical  
7 piece of it.

8 MR. HAUSKEN: Well, that's all going to be part  
9 of it, too. I mean, we intend to detail, as we showed  
10 in the -- in our email, the copy of the proposed  
11 response that we offered, the -- you know, we -- we  
12 demonstrate there, you know, what we intend to show.  
13 We're going to -- you know, things like the numbers of  
14 people that go through, you know, why those people  
15 are -- should be excluded --

16 THE COURT: All right. So the "why" would  
17 include we use a different method here?

18 MR. HAUSKEN: Yeah. It would be -- for example,  
19 the -- well, I think going down the list, we start  
20 with -- with the large number. Out of that should be  
21 excluded precheckers --

22 THE COURT: Well, whatever they are, I'm not  
23 worried about the --

24 MR. HAUSKEN: Yeah, but we have, like, I think  
25 about five or six deductions that we are anticipating



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1 would be relevant -- maybe more than that, looks like  
2 there's actually maybe about ten deductions that could  
3 be possible at any given airport. We would then  
4 present, you know, what -- at -- you know, which lanes  
5 at that airport were subject to that deduction --

6 THE COURT: Okay.

7 MR. HAUSKEN: -- and the number of passengers, to  
8 the extent available, that we should -- that we think  
9 should be deducted.

10 THE COURT: Okay. I can't help but think that  
11 would trigger followup questions, as you anticipate, and  
12 also depositions, perhaps. Remind me what we're doing  
13 on the 30(b)(6)s. You were going to furnish names. Is  
14 that right?

15 MR. HAUSKEN: Yes, we will. The problem we're  
16 running into there is that the people -- we've got 80  
17 airports, and to -- to have one person try to answer for  
18 all 80 airports would be a fool's errand. You would  
19 get -- you know, we would educate the person based on,  
20 you know, some kind of a book of information that we --  
21 or the interrogatory answers, and all they would know  
22 pretty much is that. So, you know, we would anticipate  
23 that the -- if they want to have meaningful depositions,  
24 that it's going to have to be at some much lower level.

25 THE COURT: Right. But remind me, the last time

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1 we were here, maybe on the phone, we talked about your  
2 furnishing names for 30(b)(6)s.

3 MR. HAUSKEN: We will be, yes.

4 THE COURT: Does that have a time frame?

5 MR. HAUSKEN: Ah, I don't think it did. We  
6 anticipated answering that as -- with the  
7 interrogatories.

8 THE COURT: All right. So you anticipate the  
9 depositions would take place after December 19th?

10 MR. HAUSKEN: Yes, Your Honor. Yeah,  
11 realistically, if we're going to have the depositions  
12 occur before then, then there's no point in having the  
13 interrogatory.

14 THE COURT: Fair enough.

15 Are there any other outstanding discovery  
16 requests either from the Plaintiff or from the Defendant  
17 that we haven't talked about today?

18 MR. HAUSKEN: Not from the Defendant. I would  
19 rather let Plaintiff answer for himself as to what -- or  
20 to itself as to which ones they think are still  
21 outstanding, other than -- obviously, the 30(b)(6)s are  
22 out there, three depositions of particular witnesses  
23 that are -- have been held up.

24 THE COURT: So April 30, is that what you're  
25 proposing?

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1 MR. HAUSKEN: Excuse me?

2 THE COURT: That would be for concluding? So if  
3 interrogatories, depositions were noticed, they will all  
4 have to be done in such a way that they would be closed  
5 out by then?

6 MR. HAUSKEN: That is correct.

7 THE COURT: All right. Let's hear from the  
8 Plaintiff.

9 MR. HAUSKEN: Okay. Before we do, Your Honor, I  
10 would like to comment on this supplemental brief,  
11 because it --

12 THE COURT: Which you haven't read?

13 MR. HAUSKEN: Which I haven't read. You know,  
14 I -- I think there are two things that I did take away  
15 from it just by glancing over it.

16 THE COURT: Okay.

17 MR. HAUSKEN: One is it's 32 days late.

18 THE COURT: Right.

19 MR. HAUSKEN: And while I don't -- you know, just  
20 looking down the table of contents and the table of  
21 authorities, it doesn't cite any law applicable to 1498,  
22 and this Court obviously has a wealth of law in that  
23 area. So I -- it does not seem to address that.

24 And the third thing I would note -- and I haven't  
25 looked at it with any great detail -- but the Exhibit A

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1 seems to have been altered from its original state,  
2 which is what we -- what we sent Mr. Graveline, and the  
3 only way I noted that is, as I mentioned earlier, the --  
4 the copy that we provided to Mr. Graveline and to the  
5 Court had this "For Discussion Purposes Only" on the  
6 top, and the exhibit does not.

7 THE COURT: Okay, all right. Thank you.

8 MR. GRAVELINE: Your Honor, our concern on what  
9 counsel has proposed is exactly what you just noted,  
10 that by December 19th, which is quite a ways off, what  
11 essentially we're going to get is an interrogatory  
12 answer that is going to be largely, if not entirely,  
13 written by counsel with then no ability to test the  
14 information in there.

15 You know, trying to go out and take 80-some  
16 depositions I don't think is feasible. I do think if  
17 this is the Government's position that they can educate  
18 the 30(b)(6) witness on this topic, and then we can just  
19 ask that witness if there's documents, and the witness  
20 can say no. But to wait, you know, several months  
21 forward in the case simply so they can conduct  
22 interviews, give us a written interrogatory answer that  
23 we can't use, I just don't think is going to move the  
24 case closer to trial.

25 THE COURT: Well --

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1 MR. GRAVELINE: I mean, with regard to the case  
2 law, I think that case law is directly on point. Where  
3 a party has not kept records of its infringement, I  
4 think an adverse inference is allowable, and I think  
5 those cases are precisely on point, and I think that's  
6 exactly what happened here.

7 The Government clearly knew about the patent  
8 many, many years ago. The case was even filed in 2011,  
9 and the Government apparently has not kept records of  
10 its use of the patented methods.

11 THE COURT: I think I raised that question myself  
12 at some point earlier, but I think it's premature in  
13 terms of whether or not inferences should be drawn, and  
14 I'm -- I'm willing to wait until December 19th, and  
15 I'm -- I guess I'm telling the Plaintiff it has to.

16 I take Mr. Hausken at face value in telling me  
17 that this is going to be something that will hopefully  
18 inform the Plaintiff to a level of detail that makes  
19 future depositions and discovery more meaningful. So I  
20 will use those dates, December 19th and April 30th, on  
21 the assumption that if there's any subsequent discovery,  
22 it will be triggered in advance of that deadline  
23 sufficient under the normal rules to conclude it.

24 MR. GRAVELINE: Your Honor, could we make a  
25 request that the Government not be allowed to ask for

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1 any further extensions beyond that? As I think we noted  
2 in our paper, I think we're on extension seven or eight  
3 at this point, and obviously the expense to  
4 SecurityPoint is significant. So we would ask for a  
5 ruling that if the Government asks for another  
6 extension, we be granted our fees.

7 THE COURT: I'm not going to do that. I'm  
8 sympathetic with it, and I guess I -- I take the view at  
9 this point, absent some -- well, I just said I wasn't  
10 going to use adjectives -- I didn't want you to use  
11 adjectives, so I won't. And so I won't say what my  
12 standard would be for granting an extension of time, but  
13 it would have to be well supported.

14 So I'll change the discovery deadline  
15 accordingly, and can we get by with my oral rulings on  
16 the first motion?

17 MR. GRAVELINE: We can. I have just a couple of  
18 followup questions on that.

19 THE COURT: Oh, dear. Okay.

20 MR. GRAVELINE: I think they're minor.

21 With regard to SecurityPoint's attorneys' fees,  
22 we do believe that is properly an issue in the case, and  
23 our request for things like opinions of counsel were if  
24 the Government plans to rely on opinions of counsel to  
25 establish that its litigation position was substantially

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1 justified, I think we are entitled to the document in  
2 that case. If the Government doesn't intend to rely on  
3 that, we don't need it.

4 THE COURT: Right. It's -- well, all right,  
5 let's deal with that. You can stay right there,  
6 Mr. Hausken.

7 MR. HAUSKEN: Your Honor, I think --

8 THE COURT: Is there any way to know at this  
9 point? Is there any way to know at this point what the  
10 Government's argument is going to be on that issue?

11 MR. HAUSKEN: I think the law as to attorneys'  
12 fees under 1498, which as the Court pointed out is taken  
13 directly from the Equal Access to Justice Act, I think  
14 that law is very clear. And I think it's extremely  
15 clear that, number one, there is to be no separate issue  
16 discussion. It's the substance of the position as a  
17 whole, not divided down into parts.

18 I think it's also clear that it is a decision  
19 that -- the substantial justification is to be made by  
20 the Court on the record before it, not on discovery, and  
21 I think it's very clear that courts -- that parties are  
22 not allowed to take discovery on the attorneys' fee  
23 issues.

24 In fact, under the -- in the EAJA statute, in the  
25 litigation -- in the committee reports that accompanied

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1 the original EAJA statute, it was made clear that there  
2 was not to be discovery on attorneys' fees based on  
3 this. It's to be made on the record.

4 THE COURT: Well, are you -- well, I'm not sure  
5 which point you're addressing. The -- I believe the one  
6 Mr. Graveline referred to was whether or not you are  
7 going to be relying, for the substantial justification  
8 argument, on in-house attorneys' assessments of the  
9 validity of the litigation.

10 MR. HAUSKEN: And the answer to that is, as I  
11 said, I think it's clear that the record -- that the law  
12 is that we can't, that right as of today, we are -- the  
13 Court has to make -- first, it's the Court that makes  
14 the substantial justification determination, but it's to  
15 make that based on the record.

16 THE COURT: Um-hum.

17 MR. HAUSKEN: So we could argue --

18 THE COURT: Right. Well, yeah, that's my view of  
19 the world as well. It's the existing record, that you  
20 don't have a separate level of discovery on that  
21 subject. So I hear what Mr. Hausken says, I agree with  
22 it, and I'm also assuming that means that if this  
23 argument gets raised down the road, I'd be able to cite  
24 Mr. Hausken back to himself.

25 MR. GRAVELINE: Your Honor, if that's what we're



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1     going to do, then, if we're going to wait to do that,  
2     I -- I would request that we not produce information  
3     about SecurityPoint's legal fees to date, which is what  
4     the Government has asked for. So if we're going to  
5     decide this issue later, that's fine, but I think it's  
6     unfair for us to produce information regarding our  
7     attorneys' fees if we are not getting, in exchange,  
8     information from the Government relating to its  
9     substantial justification.

10           THE COURT: Those are two different things, so  
11     let's deal with them separately.

12           All right, you made the comment just a second ago  
13     that there shouldn't be discovery about attorneys' fees.  
14     Does that apply to the Government as well?

15           MR. HAUSKEN: No. There's a very different --  
16     our need for their attorneys' fees is a very different  
17     reason than their need for how we get to our decisions  
18     for substantial justification. Now, the reason we're  
19     asking for attorneys' fees information, as to the dollar  
20     value of the fees, is because in order -- they've made  
21     two claims. They have made a reasonable royalty claim  
22     and they've made at least one other claim for lost  
23     profits.

24           If they're -- and there's I think also one based  
25     on some form of financial calculation that we are

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1     totally unclear on and have -- and the Court has -- has  
2     said that SecurityPoint does not have to provide us with  
3     the 26(a) disclosures at this time for that. So -- but  
4     we -- but there's at least one claim, and that's a lost  
5     profits claim, that would -- for which the financial  
6     information, including things like how much they're  
7     spending for attorneys' fees, are necessary in order to  
8     figure profit. So -- and, you know, to some degree --

9             THE COURT: I'm sorry. Are you talking about  
10     attorneys' fees related to litigation?

11            MR. HAUSKEN: For every -- for anything, but what  
12     we have to know -- if they are going to play lost  
13     profit, we have to know what their -- what their profit  
14     is, and the way you calculate profit, among other  
15     things, is you have to take the expenses from the --  
16     from the income.

17            THE COURT: Right, but surely you can't put  
18     somebody to litigation and then say, well, you -- you  
19     can't make any money on this because you're having to  
20     spend so much money fighting us.

21            MR. HAUSKEN: Well, if they want to claim that  
22     some part of the attorneys' fees is caused by the  
23     litigation and should be -- that there should be some  
24     recalculation based on that, that's fine, but until we  
25     see what the entire picture is -- see, they have blacked

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1 out, like, half -- like whole pages sometimes, and until  
2 we see what, like, the profit and loss is and what  
3 those -- why the -- what expenses there are --

4 THE COURT: Hold on a second. Are you asking for  
5 this litigation, prelitigation as well as  
6 postlitigation?

7 MR. HAUSKEN: Well, for any period that they're  
8 claiming lost profits.

9 THE COURT: Oh, I see.

10 MR. HAUSKEN: So -- and we're not asking -- we're  
11 not asking for details as to what they're spending the  
12 money on. We're saying, you know, give us the  
13 expenses -- you know, it says -- if it says "attorneys'  
14 fees," which I wouldn't expect that in their profit and  
15 loss statements and expense statements and balance  
16 sheets that they would have great detail as to how the  
17 attorneys' fees are being spent, but --

18 THE COURT: See, I assumed that your request was  
19 in anticipation of a request down the road under EAJA  
20 for attorneys' fees.

21 MR. HAUSKEN: No, no. We have to -- we need it  
22 right now, at least, for the lost profits. Now, once  
23 we -- once they make the claim, then they have to  
24 support it with more detailed information, and we would  
25 expect then that we would get to see everything.

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1           THE COURT:  Hmm.  Okay, let's talk about that.  
2    If the Government is entitled to challenge the lost  
3    profits with "you weren't making any money on this,"  
4    right, so to the extent we're talking about the period  
5    prelitigation, why wouldn't all expenses, including  
6    whatever it takes to --

7           MR. GRAVELINE:  I think that's a different issue,  
8    Your Honor, and I think we could provide, you know,  
9    costs to obtain a patent, things like that.  I think  
10   what counsel is arguing now, though, is that the  
11   Government can take the patent, can steal the invention,  
12   use the invention, and then try to deduct attorneys'  
13   fees that they forced upon us from lost profits, and  
14   there's no case law authority about that whatsoever,  
15   Your Honor.

16          THE COURT:  Well, does chronologically this thing  
17   cleave naturally?  The litigation was filed in '11.

18          MR. GRAVELINE:  Correct.

19          THE COURT:  But was that preceded by a lot of  
20   prelitigation activity?

21          MR. GRAVELINE:  I would imagine there would be  
22   documents that would show legal fees of getting ready  
23   for the case.

24          THE COURT:  Hmm.  So prelitigation, it would be  
25   relevant on the question of lost profits.

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1 Postlitigation, to the extent you can differentiate or  
2 anybody can differentiate it, it would be relevant  
3 either to an attorneys' fee request or to lost profits.

4 MR. GRAVELINE: I don't believe it would be  
5 relevant at all to lost profits. I do think it would be  
6 relevant to an attorneys' fees request. My point is if  
7 Your Honor wishes to put that inquiry until later in the  
8 case, where we would then have an opportunity to get  
9 documents from the Government relating to any  
10 substantial justification, we could produce our invoices  
11 at that point.

12 THE COURT: I -- I -- I don't think that that tit  
13 for tat necessarily makes any sense. For the time  
14 being -- so when was the patent -- when did it  
15 originate?

16 MR. GRAVELINE: It issued in 2005.

17 THE COURT: Um-hum. Well, for the time being, go  
18 ahead and furnish what you are proposing to furnish in  
19 terms of just raw numbers on attorneys' fees between  
20 2005 and 2011, even if that does include some other  
21 maybe litigation expense.

22 You were about to tell me something?

23 MR. HAUSKEN: Yes. I think that our -- if you  
24 look at pages 5 and 6 of our package, this is the kind  
25 of example of why we're concerned, is that -- these

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1 large blackouts here. We are assured that some of those  
2 are attorneys' fees. We don't know what others are, but  
3 you can't make sense -- this happens to be a general  
4 ledger. You can't make sense of that general ledger  
5 unless you know what the numbers are.

6 At some point in time, if we're to -- if they are  
7 going to claim lost profits during the litigation, we  
8 have to know what the -- you know, we're not talking  
9 about detailed statements or -- and we've never asked  
10 for their attorneys' bills or invoices during --  
11 postlitigation. All we're asking for is the high-level  
12 stuff that tells us how much was spent so we can  
13 calculate profit and loss.

14 THE COURT: And what I'm allowing you to get or  
15 ordering the Plaintiff to produce is at least through  
16 2011, and we can revisit this question. At some point  
17 it becomes relevant to two issues, but I'm just a little  
18 concerned that it's going to be impossible to strip out  
19 the relevance for lost profits versus litigation  
20 expense.

21 MR. HAUSKEN: Well, in that case, Your Honor, if  
22 we're not allowed to get the information to -- in order  
23 to defend ourselves against the lost profits claim, then  
24 we -- then we -- then they can't pursue the lost  
25 profits.

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1 THE COURT: Well, we'll deal with that later.  
2 You're welcome -- after you get this information, you're  
3 welcome to come back and revisit this question.

4 MR. GRAVELINE: We have just one more issue, and  
5 I think we have had some discussions with counsel about  
6 this. We may not be able to resolve it now, but we are  
7 trying to get our experts and our support staff access  
8 to SSI, and we have been having trouble doing that. The  
9 Government has taken the position that they need to  
10 separately get fingerprinted and register. I think the  
11 rules are clear that that's not the case, that as long  
12 as they're working for us, they can get access to the  
13 SSI.

14 THE COURT: What is the SSI?

15 MR. GRAVELINE: Sensitive security information.

16 THE COURT: What kind of information are we  
17 talking about? Oh, you're talking about security-  
18 clearing information?

19 MR. HAUSKEN: So the -- there's a separate SSI  
20 protective order that specifically says that the --  
21 well, I think it's paragraph 5-3 of the order, it says  
22 litigation support staff, including paralegals and  
23 administrative assistants and expert consultants and  
24 witnesses, may not access SSI unless authorized by TSA  
25 in writing.

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1           And TSA's position is that they will not process,  
2   in writing, the requests unless they -- unless the  
3   people get individually fingerprinted and comply with  
4   the other requirements for submission.

5           THE COURT: Now, does that involve anything  
6   beyond fingerprinting? What does that involve? Do you  
7   have to get a top secret clearance or something?

8           MR. HAUSKEN: Oh, no, but there is a -- they do a  
9   background check and a records check.

10          THE COURT: Who runs it?

11          MR. HAUSKEN: TSA.

12          THE COURT: So it's not going back to the FBI?

13          MR. HAUSKEN: No.

14          THE COURT: How long does that take?

15          MR. HAUSKEN: I think in the case of  
16   Mr. Graveline and Ms. Burson, who -- I don't think it  
17   took -- I think it took a month or two, maybe, maybe at  
18   most. There was -- there was a hitch there in making  
19   sure that the information had been submitted, and then  
20   once we got that cleared up, I think they -- it was done  
21   relatively quickly.

22          THE COURT: Well --

23          MR. HAUSKEN: But the other side of it, Your  
24   Honor, is that by regulation and under the protective  
25   order, the -- any dispute regarding the approval of



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1 those has to be made in a separate action to the Court  
2 of Appeals directly, under statute.

3 THE COURT: Okay. Well, let's stick with the  
4 current wording of the -- that SSI protective order. It  
5 doesn't sound like it would be too cumbersome. To the  
6 extent you want folks to access it, let's go through the  
7 routine we've already spelled out.

8 MR. GRAVELINE: Okay.

9 THE COURT: Is that it?

10 MR. GRAVELINE: All right. Yes, thank you.

11 THE COURT: No more shoes to drop? Okay.

12 I will visit the question of the litigation  
13 agreements. For the time being, let's stick with what I  
14 said on the record, that I guess I reserve the right to  
15 revisit that question.

16 All right. We're adjourned.

17 (Whereupon, at 11:52 a.m., the proceedings were  
18 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3

4 I, Susanne Bergling, court-approved transcriber,  
5 certify that the foregoing is a correct transcription  
6 from the official digital sound recording of the  
7 proceedings in the above-titled matter.

8

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12 DATED: 11/02/2017

s/Susanne Bergling

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SUSANNE BERGLING, RMR-CRR-CLR

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